Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROBERT LEE ZIMMERMAN,

PETITIONER

v.

BISHOP ESTATE, ET AL,

RESPONDANTS

ON PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert Lee Zimmerman
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50pp

QUESTION PRESENTED FOR REVIEW

Without any exigent circumstances whatsoever, and without judicial authoriziation of any kind, is an armed and violent police break-in (ten uniformed police officers with guns drawn) into a squatter's long-term home for the purposes of intimidation, eviction, search and arrest of the alleged squatter, her family of small children and her guests violative of rights secured by the Fourth Amendment?

LIST OF PARTIES

Parties not listed in the caption are:

BISHOP ESTATE TRUSTEES WILLIAM RICHARDSON, HENRY PETERS, OSWALD STENDER, MYRON THOMPSON and MATSUO TAKABUKI in their official capacities; BISHOP ESTATE TRUSTEES WILLIAM RICHARDSON, HENRY PETERS, MYRON THOMPSON and MATSUO TAKABUKI individually; ELAINE DUNG and PAUL CATHCART, in their capacities as employees of Bishop Estate and individually; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; CITY AND COUNTY OF HONOLULU; DOUGLAS GIBB, in his former capacity as Chief of Police of the Honolulu Police Department

LIST OF PARTIES

and individually; PETER BERTULFO, in his capacities as a Police Officer for the City and County of Honolulu and as a Caretaker for the Bishop Estate and individually; TIM LIU, in his capacity as a legal advisor to the Police Department of the City and County of Honolulu; JAMES R. AIONA, JR., in his former capacity as Head of the Trials Division of Corporation Counsel for the City and County of Honolulu and individually; TEDSON KOjA, KEITH HawaiianSHIRO and CHARLES MARSLAND, in their capacities and former capacity as Prosecutors for the City and County of Honolulu;

LIST OF PARTIES

CAPTAIN B. CORREA, LT. L. WONG, SGTS. W. CAMBRA, K. LUKE and T. HIRAYAMA and OFFICERS G. WILLIAMS, G. GOEAS, G. NIHIPALI J. KEANU and G. WITT, in their official capacities as Police Officers and individually.

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RESPONDANTS

ON PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App: 5583-5602) was Filed May 31, 1994. Petitioner's Petition for Rehearing was Denied on July 14, 1994.

JURISDICTION

The United States Supreme Court has jurisdiction under 28 U.S.C. Section 1254(1).

Original jurisdiction was conferred on the United States District Court of Hawaii by 28 U.S.C. Section 1331 and appellate jurisdiction was conferred on the United

States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. Section 1291.

CONSTITUTIONAL AND STATUATORY PROVISIONS

The Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment

"No person shall be deprived of life, liberty, or property without due process of the law and equal protection of the laws."

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. Background (App:5588-5589).

Respondant Bishop Estate, Hawaii's largest landlord, pursued a failed lawsuit in which it claimed landlord-tenant dominion over the home of a native Hawaiian family, a mother and her four infant children. Respondant's lawsuit to evict the Hawaiian family failed because Respondant could not prove that it owned the Hawaiian family's home. Soon after failing to evict the Hawaiian family in an appropriate law court, Respondants devised another scheme. Respondant Bishop Estate bribed Respondant beat police officer with a one year's free lease to the property on which the Hawaiian family's home then resided, if he, in return, would use his police powers to threaten and intimidate the

Hawaiian family into moving out of their home and then proceed to destroy it.

For several months the Respondant police officer and Respondant Bishop Estate jointly pursued a pattern of repeated threats and intimidations against the Hawaiian family at the gate to the Hawaiians home, but never entering onto the property or into the home. But, like the failed lawsuit, Respondant's threats and intimidations failed to coerce the Hawaiian family into moving from their home of ten plus months.

Then, Respondants escalated their threats and intimidations to direct violence. With guns drawn, Respondants, together with approximately ten uniformed officers broke into the Hawaiian family home and ordered everyone present to leave or be arrested. They did this without a shread of judicial

authorization, no eviction order, no warrant, no attempt to get a warrant, no deed or title to the property, absolutely nothing to even remotely justify their armed assault.

Rightfully thinking that the home had been abandoned and a sacred place of refuge for native Hawaiians, and with the permission of the home's prior occupants, the Hawaiian family had moved into the home and had substantially improved both the home and the property, which had resembled a garbage dump, a full six months before Respondants claimed dominion over them with their failed lawsuit and a full ten months before Respondants planned and executed the assault upon them.

At the time of Respondant's break-in to the Hawaiian family home, Petitioner, was an invited houseguest of the Hawaiian family. When the Hawaiian family and Petitioner

refused to obey the order of the Honolulu Police Department's ten armed police officers to quit the home, they were handcuffed, searched, taken from the home, arrested for trespass and imprisoned.

2. Disputed Facts Improperly Adjudicated by the Ninth Circuit That Should Have Gone To A Jury.

A. OWNERSHIP AND CONTROL OF THE PROPERTY

1. The Ninth Circuit Opinion states that Respondants had presented to the police at the time of the arrests some form of proof of ownership (App.5591-line 10). This is entirely false and has been vigorusly disputed. At no time, either preceding the arrests, during the arrests or after the arrests have Respondants presented such proof of ownership. At the time of the arrests, Respondants produced zero documentation

regarding their ownership and/or control of the property and to this date have produced nothing substantial such as a deed or certificate of title. Except for the arrest and imprisonment, the Hawaiian family dwelled in the home for over a year.

2. Neither prior to or after the break-in and arrests did Respondants exercise any control over the property on which the Hawaiian family was residing; conversely, the Hawaiian family had resided there, uninterrupted, for over a year. Respondant beat police officer, has testified that prior to the arrests, he had never even ventured onto the property of into the dwelling unit and Respondant's land manager, who closely supervised the break-in and arrests, makes the very same admission. Thus, there are absolutely no reasonable grounds for the

police to believe they had authority to break into the Hawaiian home. Conversely, Respondant's, including the police officers, knew full well that the Hawaiian family was a long-term resident on the property. The police participated in the break-in in order to curry favor with Respondant Bishop Estate and to gain the use of the property for themselves.

3. MATERIAL UNDISPUTED FACTS OVERLOOKED BY THE NINTH CIRCUIT

A. Respondant Acquiesence

The Ninth Circuit overlooked the fact of a failed dispossesss lawsuit brought by the purported landlord against the Hawaiian family. By first serving a notice of disposses proceedings on the Hawaiian family at the property where they were

allegedly squatting for over six months (via U.S. mail) and then defaulting in that lawsuit, Respondant Bishop Estate acknowledged the Hawaiian family's presence on and control of the property. At least six months prior to Respondants failed lawsuit to dispossss the Hawaiian family, the native Hawaiian's had, with the permission of the prior occupants, moved onto the property. The long-term receipt of mail at your home, including mail from a purported landlord, is more than sufficient to give rise to a reasonable subjective and objective expectation of privacy as in State v. Dias, 609 P.2d 637, 639-40 (1980).

B. LANDLORD-POLICE ACQUIESENCE

The Ninth Circuit has overlooked the undisputed fact that both the Respondant Bishop Estate and the Respondant police

officers acquiesed to Petitioner's presence on the property on the date of the arrests. Petitioner, in plain view of Respondant Bishop Estate and Respondant police officers entered upon the property several times and was never warned that such entry was unlawful. Such acquiesence by Respondants to Petitioner's presence on the property, over and above his priviledges as an invited guest of the Hawaiian family, give rise to an objective expectation of privacy within a private dwelling unit.

C. THE WARRANTLESS SEARCH AND SEIZURE

In its Opinion (App: 5583-5602) the Ninth Circuit entirely avoided the crucial fact that there were no exigent circumstances motivating the actions of the police and there was plenty of time, many months, for the police to obtain appropriate search

and/or arrest warrants. That the police could not obtain such warrants, though there was plenty of time to do so, is a glaring fact sufficient in itself to give rise to a reasonable belief of foul play on the part of Respondants.

4. MATERIAL POINTS OF LAW OVERLOOKED BY THE NINTH CIRCUIT

A. FEDERAL AND STATE LAW

The Ninth Circuit has overlooked the fact that under federal law probable cause, without exigent circumstance, is not sufficient to permit police to proceed with a warrantless search and seizure within a private dwelling unit. Thus, even if state law required only probable cause, the federal requirement for exigent circumstance is superior and would supercede state law.

Under the longstanding doctrine of federalism, the individual states may expand upon the Constitutional rights of the people but may not curtail them.

B. THE NATURE OF THE PRIVACY RIGHT

Petitioner's right to privacy within the dwelling unit accrue from far more than his status as a guest of the Hawaiian family. Even if the Hawaiians were devoid of privacy rights, all of the Respondants acquiesed to Petitioners presence on the property and once inside the Hawaiian family home, out of sight of the Respondants, Petitioner's privacy rights accrue not just from his status as a guest of the Hawaiian family, or the fact of acquiesence, but even more importantly from his status as a person protected by the Fourth Amendment from unwarranted governmental intrusion within a private

dwelling unit. Thus, Petitioner's privacy rights within the dwelling unit are even greater the those of the Hawaiian family.

REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit, Knowing the Enormous Burden of the Highest Court, Has Opted To Totally Ignore Long-Standing Precedent of the Highest Court.

This case is at once the least important and the most important case for America's highest court: Least important because the constitutional misconduct portrayed herein is rare and damaged only a small group of ordinary people; most important because this case is the case of every man, woman and child who dwells within or visits our great country.

If the richest of landlords can pay a local beat police officer, as is here the

case, to roust a family from their home without a shread of judical authorization, and get away with it, what is left of the Fourth Amendment for ordinary people?

For many Americans our Constitution, and particularly our Bill of Rights, is as sacred to their political views and perspectives as the bible is to their religous convictions. Ordinary Americans, immersed in the time-consuming details of job, family and community have come to assume that their constitutional rights are sacrosanct, a matter of birthright, not readily violated, vigorously protected by every tier of government, from the smallest village to the United States Supreme Court.

But, with an increasing velocity, the most fundamental rights of all Americans are being ignored by governmental units caught up

in their own sense of importance and power. Nowadays, the economics of constitutional rights mandates that in everyday life only the very rich or those with high public profiles have constitutional rights, for only they can pay the enormous tariff necessary to uphold their rights.

In this case, the most fundamental rights of an indigent native Hawaiian woman, her family of small chldren and her houseguests are trampled by a conspiracy formed by a rouge band of police officers seeking profit for themselves and the largest private landowner in the State ot Hawaii with assets of over $30 billion. The lower courts made a mockery of those rights, opting to side with the rich and powerful, and in so doing were also mocking the most fundamental laws of our land. In all of their decisions,

the lower courts ignored all of the bedrock law of the United States Supreme Court supportive of Fourth Amendment rights of ordinary people in favor of the interests of the rich and powerful.

2. The Warrantless Police Break-in to a Private Dwelling Unit and Subsequent, Searches, Seizures and Arrests are, Absent Exigent Circumstances, Violative of the Fourth Amendment.

The United States Supreme Court has declared that quests have Fourth Amendment rights. In Minnesota v. Olson, 110 S.Ct. 46 (1989) the Court declared that a home is a place where a person will go to secure some privacy and that whether that person is the host or a guest is irrelevent. The guest's Fourth Amendment rights in the host's home are separate and distinct from those of the host, but they may, as is the case here, be

asserted in a similar manner. The Fourth Amendment was designed to protect both the innocent and the guilty from warrantless seizure within a home. The Fourth Amendment protects people with reference to their place and in this way protects the home from warrantless invasion absent exigent circumstances, Katz v. United States, 389 U.S. 347, 351 (1967), Payton, 445 U.S. at 589-90 and Steagald, 451 U.S. at 213; United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978). Clearly, guests in a home have privacy interests that society recognizes as reasonable.

Even if the police had had an arrest warrant, they did not even seek one, they would have violated the Steagald requirement by failing to obtain a search warrant and clearly established Hawaii state law. In

State v. Tanaka, 67 Haw. 658, 661-662 (1985) the court noted that society's recognition of a reasonable expectation of privacy is even greater than that provided by the U.S. Constitution. "We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually paralleled provision in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted. In our view, Article 1, Section 7 of the Hawaii Constitution recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights."

By failing to post the property as private, and by asserting landlord/tenant dominion over the Hawaiian family and the property, Respondants acquiesced to the Hawaiian family's presence on the property

for a period of time, considerable enough, for the Hawaiian family and their guests to establish and claim an expectation of privacy on that property that society would deem reasonable.

It is undisputed that the Hawaiian family was a long-term resident on the property but the Ninth Circuit has ruled that the Hawaiian's and Petitioner were not entitled to Fourth Amendment privacy rights. But the Ninth Circuit's view contradicts the clear ruling of the United States Supreme Court which in Payton and Steagald. The Payton decision used three terms to describe the premises that can be entered only with a warrant absent exigent circumstances- "residence," "home," and "dwelling." A person's residence acquires the status of a "home" in a "few days." Steagald, 101 S.Ct.

at 1657. Clearly, then, the Hawaiians and their quests were entitled to an expectation of privacy and Fourth Amendment protections.

3. The Lower Courts Greatly Exceeded Their Authority By Applying Improper Legal Standards To Avoid Long-Standing Precedents of the U.S. Supreme Court

The lower courts have ruled that "exigent circumstances," even though no such exigent circumstances have been alleged or plead by the various Respondants, are irrelevent and has sanitized the actions of the police as proper and lawful based on Matlock permission as it has evolved from United States v. Matlock, 415 U.S. 164 (1974). But the Court's application of Matlock permission is clearly erroneous. Matlock defined the common authority over

property that would give a third party the right to consent to a search in terms of mutual use of the property, Matlock, at 171 n.7. The waiver by one person of another's constitutional rights, absent an express agency relationship, which has not been either claimed or established, is unacceptable. Thus, use of Matlock permission as a means to circumvent the clearly established search and arrest warrant requirements of the Fourth Amendment is in apposite because Respondants were clearly not in possession or control of the property on the date of the break-in, seizure and arrests, nor were they for a substantial period of time preceding November 1, 1988. See Stoner v. California, 376 U.S. 483, 489 (1964); United States ex rel. Cabey v.

Mazurkiewicz, 431 F.2d 839, 845 (3rd Cir. 1970).

The United States Supreme Court in Matlock authorized third party consent searches over the objection of an occupant only by co-occupants. None of the Respondants have claimed the status of "co-occupant" and none of the Respondants was a "co-occupant."

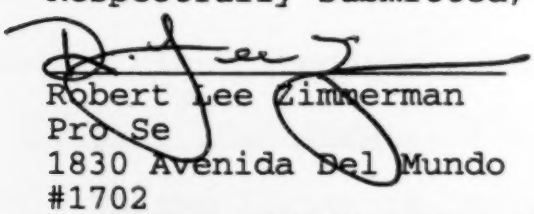
CONCLUSION

The warrantless arrest of Petitioner inside the Hawaiian family's home, without search or arrest warrants, without probable cause, without a serious crime and without exigent circumstances is clearly violative of Petitioner's rights as secured by the Fourth Amendment and clarified by the United States Supreme Court such that such rights are now considered "Black Letter Law."

For the foregoing reasons, Petitioner respectfully requests the petition for a writ of certiorari should be granted.

DATED: October 7, 1994

Respectfully submitted,



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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT LEE ZIMMERMAN,
Plaintiff-Appellant,

v.

BISHOP ESTATE, a charitable trust; BISHOP ESTATE TRUSTEES WILLIAM RICHARDSON, HENRY PETERS, OSWALD STENDER, MYRON THOMPSON and MATSUO TAKABUKI in their official capacities; BISHOP ESTATE TRUSTEES WILLIAM RICHARDSON, HENRY PETERS, MYRON THOMPSON and MATSUO TAKABUKI individually; ELAINE DUNG and PAUL CATHCART, in their capacities as employees of Bishop Estate and individually; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; CITY AND COUNTY OF HONOLULU; DOUGLAS GIBB, in his former capacity as Chief of Police of the Honolulu Police Department and individually; PETER BERTULIO, in his capacities as a Police Officer for the City and County of Honolulu and as a Caretaker for the Bishop Estate and individually,

NO. 92-15794
92-16048
D.C. NO.
CV 90-00685-ACK
OPINION

TIM LIU, in his capacity as a legal advisor to the Police Department of the City and County of Honolulu; JAMES R. AIONA, JR., in his former capacity as Head of the Trials Division of Corporation Counsel for the City and County of Honolulu and individually; TEDSON KOJA, KEITH KANESHIRO and CHARLES MARSLAND, in their capacities and former capacity as Prosecutors for the City and County of Honolulu; CAPTAIN B. CORREA, LT. L. WONG, SGTS. W. CAMBRA, K. LUKE and T. HIRAYAMA and OFFICERS G. WILLIAMS, G. GOEAS, G. NIHIPALI, J. KEANU and G. WITT, in their official capacities as Police Officers and individually,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Submitted August 11, 1993*
San Francisco, California

Filed May 31, 1994

*The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Before: Stephen Reinhardt, Edward Leavy, Circuit Judges, and Robert R. Merhige, Jr.,** Senior District Judge.

Opinion by Judge Leavy; Partial Concurrence and Partial Dissent by Judge Reinhardt

SUMMARY

Criminal Law and Procedure/Search and Seizure/ Attorneys and Judges

The court of appeals affirmed in part a district court judgment, reversed in part and remanded. The court held that a guest of squatters on an estate's property did not have an objectively reasonable expectation of privacy on the property.

A family, the Kanes, moved onto property owned by appellee Bishop Estate of Hawaii. The estate sent the Kanes a letter warning them that they were trespassing and had to vacate. The estate's land manager and caretaker warned the Kanes that they had to leave the estate's property. When the manager and caretaker returned with police officers, the Kanes and their guests, including appellant Robert Zimmerman, were warned that they were trespassing. Zimmerman was arrested and charged with trespass. After the Kanes moved from the premises, criminal trespass proceedings against Zimmerman were dropped.

Zimmerman sued the estate, its trustees, and certain city and county officials, alleging a civil rights violation, a conspiracy to violate civil rights, and supplemental state claims, including malicious prosecution. The district court granted summary judgment to the estate and to the city and county

**The Honorable Robert R. Merhige, Jr., Senior District Judge for the Eastern District of Virginia, sitting by designation.

defendants. The court also granted the estate's motion for attorney's fees and sanctions. The court found that many of Zimmerman's questions could not have been designed to lead to the discovery of admissible evidence, and found an improper purpose.

Zimmerman appealed, contending that the district court erred by determining that there was no constitutional violation under 42 U.S.C. § 1983. He argued that his warrantless arrest violated his Fourth Amendment rights as a guest. Zimmerman also contended that the district court erred in dismissing his supplemental state tort claims. He also appealed the district court's award of sanctions and attorney's fees to the estate.

[1] Even if the Kanes had a subjective expectation of privacy, that expectation was not objectively reasonable. [2] The Kanes were denied permission to reside on the property, and were informed that they were trespassing. There was no dispute of material fact regarding the ownership of the property or whether the estate acquiesced in the presence of the Kanes. As a guest on the property, Zimmerman had no greater right to be on the property than did the Kanes. The Kanes' improvement of the property did not give rise to a reasonable expectation of privacy when they had no legal right to occupy the land.

[3] Even if it was assumed that Zimmerman and the Kanes had an expectation of privacy that was objectively reasonable, Zimmerman's constitutional rights were not violated because the arrest was lawful. There is no Fourth Amendment violation if officers obtain the consent of a third party who possesses common authority over the premises.

[4] In addition, even if the search and seizure provision of the Hawaii Constitution applied in this civil context, Zimmerman did not meet his burden of showing that he had a legitimate expectation of privacy under Hawaii law.

[5] In granting sanctions for the frivolousness of Zimmerman's malicious prosecution claim, the district court found that there was no evidence that the estate controlled the decisions of the city prosecutor to initiate criminal proceedings. However, there was at least some evidence to support Zimmerman's claim that the estate "initiated" the proceedings. Thus, the district court abused its discretion in granting sanctions on the issue.

[6] In light of the district court's examples of improper questions contained in Zimmerman's interrogatories and requests for documents, the district court did not abuse its discretion in imposing sanctions for improper discovery motives.

Circuit Judge Reinhardt concurred specially in part and dissented in part, stating that this case was not so "exceptional" that it warranted the imposition of discovery sanctions against a civil rights plaintiff.

COUNSEL

Robert Zimmerman, Pro per, Honolulu, Hawaii, for the plaintiff-appellant.

Cheryl Nakamura, Rush Moore Craven Sutton Morry & Beh; Tracy Lowell Wolf, Deputy Corporation Counsel, City and County of Honolulu, Honolulu, Hawaii, for the defendants-appellees.

OPINION

LEAVY, Circuit Judge:

FACTS AND PRIOR PROCEEDINGS

This case arose when the appellant, Robert Lee Zimmerman, was arrested for trespass while a house guest of the Kanes, who were squatters in a shack on property owned by the Bishop Estate of Hawaii. In early 1988, the Kanes moved onto the property. In March 1988, Mrs. Kane's father wrote to the Bishop Estate and requested permission for his daughter to be appointed caretaker of the property. Permission was declined in April 1988. In June 1988, the Bishop Estate sent the Kanes a letter warning them that they were trespassing by residing on the property and that they had to vacate. The letter was followed by visits by Elaine Dung Brown, the Bishop Estate land manager, and by Peter Bertulfo, the caretaker appointed by the Estate. Bertulfo, a police officer, entered into a tenancy agreement with the Bishop Estate on October 24, 1988.

On October 26, 1988, Brown and Bertulfo went to the property and warned the Kanes that they had to leave. The family agreed to vacate in five days. On October 31, 1988, Brown and Bertulfo returned with a police officer and after discussion, they agreed to allow the Kanes one more day to vacate the premises. On November 1, 1988, Brown and Bertulfo returned with police officers, who warned the Kanes and their guests, including Zimmerman, that they were trespassing. Everyone left, except Mrs. Kane and Zimmerman, who were arrested. They were taken to the police station, charged with trespass in the second degree and released on bail.

Mrs. Kane then moved back on the property, prompting the Bishop Estate to file an action for ejectment. The Kanes then moved from the premises. The criminal trespass proceedings against Mrs. Kane and Zimmerman were dropped.

In February 1990, Zimmerman filed this pro se action against the Bishop Estate, its trustees, and certain city and county officials. The amended complaint alleged a civil rights violation under 42 U.S.C. § 1983, a conspiracy to violate civil rights, and supplemental state claims.[1] The district court granted summary judgment to the Bishop Estate and to the city and county defendants. The district court also granted the Bishop Estate's motion for attorney's fees and sanctions pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. Proc. 11.

Zimmerman, appearing pro se, appeals the district court's summary judgments in favor of the Bishop Estate and the Bishop Estate Trustees and employees (the private defendants), and the mayor of Honolulu, the City and County of Honolulu, the former and acting chiefs of police, two prosecutors, and various other municipal and county employees (the city defendants). Zimmerman argues that the district court erred by (1) determining that there was no constitutional violation under 42 U.S.C. § 1983; (2) dismissing Zimmerman's supplemental state tort claims; (3) granting protective orders as to his discovery requests; (4) denying his motions to recuse the district court judge and magistrate judge; and (5) bifurcating his punitive damages claim. Zimmerman also appeals the district court's award of sanctions and attorney's fees to the private defendants.

We affirm the district court on the merits, affirm the award of sanctions regarding Zimmerman's improper motives, and reverse the award of sanctions on the malicious prosecution claim.

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[1]28 U.S.C. § 1367 (1990) now codifies under the name "supplemental jurisdiction" the caselaw doctrines of "pendent" and "ancillary" jurisdiction.

DISCUSSION

1. *42 U.S.C. § 1983 Claim*

Zimmerman argues that the warrantless arrest violated his Fourth Amendment rights as a guest and that there were no exigent circumstances to justify the search. A party invoking Fourth Amendment protection must have a subjective expectation of privacy that is objectively reasonable. *United States v. Taketa*, 923 F.2d 665, 670 (9th Cir. 1991).

Zimmerman contends that the Kanes had an expectation of privacy because of the length of residency, their improvement of the property and the private defendants' acquiescence in the Kanes' presence. There is no evidence that the Kanes owned, rented, or leased the land or the residence. The private defendants were subsequently given summary possession of the parcel in state court proceedings.

[1] Even if Mrs. Kane had a subjective expectation of privacy, her expectation was not objectively reasonable. In *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11-12 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976), the court held that squatters had no reasonable expectation of privacy where they had no legal right to occupy the land and build structures on it. Similarly, the Tenth Circuit has concluded that the Fourth Amendment rights of a trespasser living on federal land were not violated because he had no reasonable expectation of privacy. *United States v. Ruckman*, 806 F.2d 1471, 1472-74 (10th Cir. 1986).

[2] Here, the Kanes requested, and were denied, permission to reside on the property. Three months later they were informed by letter that they were trespassing. In later visits they were told that they were trespassing. There is no dispute of material fact regarding the ownership of the property or whether the private defendants acquiesced in the presence of the Kanes. As a guest on the property, Zimmerman had no

greater right to be on the property than did the Kanes. The Kanes' improvement of the property does not give rise to a reasonable expectation of privacy when they had no legal right to occupy the land. *See Amezquita*, 518 F.2d at 12.

[3] Even if we assume that Zimmerman and the Kanes had an expectation of privacy that was objectively reasonable, Zimmerman's constitutional rights were not violated because the arrest was lawful. There is no Fourth Amendment violation if the officers have obtained the consent of a third party who possesses common authority over the premises. *United States v. Matlock*, 415 U.S. 164, 171 & n.7 (1974). The police were provided with evidence of the private defendants' ownership of the property at the time of the arrest. Moreover, even if the private defendants did not have actual authority over the premises, the arrest was valid because the police, at the time of the entry, reasonably believed they did have authority over the premises. *See Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990). Because we conclude that there is no evidence of a constitutional violation, we do not decide whether the private defendants acted under color of state law.

We also affirm the district court's grant of summary judgment to the city defendants on the federal claims because there is no evidence that Zimmerman's constitutional rights were violated. *See Palmerin v. Riverside*, 794 F.2d 1409, 1414-15 (9th Cir. 1986) (absent any constitutional violations by individual defendants, there can be no municipal liability).

2. *Supplemental State Claims*

In his amended complaint, Zimmerman alleges several state tort claims. We review the district court's determination of state law de novo. *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc).

a. *Malicious Prosecution*

Under Hawaii law, a warrantless arrest is lawful if a police officer has probable cause to believe that an offense is being

committed in the officer's presence. *House v. Ane*, 538 P.2d 320, 325 (1975). Hawaii agrees with the rule in *Amezquita*, 518 F.2d at 11-12, that squatters have no reasonable expectation of privacy. *State v. Dias*, 609 P.2d 637, 639-40 (1980). A landlord's acquiescence to the trespass for a "considerable period of time," however, can give rise to an expectation of privacy. *Id.* at 640. Here, there is no evidence that the private defendants acquiesced in the Kanes' trespass. Because the officers had probable cause to believe that a trespass was being committed in their presence, the warrantless arrest was lawful. *See House*, 538 P.2d at 325. As to the private defendants, even if we assume that they "initiated" the prosecution, the existence of probable cause protects them from liability as well.

b. *Article I, section 7, of the Hawaii Constitution*

[4] The application of article I, section 7, of the Hawaii Constitution, is limited to criminal cases.[2] *State v. Okubo*, 651 P.2d 494, 500 (1982), *aff'd*, 682 P.2d 79 (1984). Even if section 7 applied in a civil context, Zimmerman has not met his burden of showing that he had a legitimate expectation of privacy under Hawaii law. *See Dias*, 609 P.2d at 639-40. In addition, Hawaii has adopted the *Matlock* rule, i.e., that a third party can validate a warrantless search if they have authority to consent to search. *State v. Mahone*, 701 P.2d 171, 173-74 (1985). We agree with the district court's dismissal of Zimmerman's claim under Article I, section 7, of the Hawaii Constitution.

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[2]Article I, section 7, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Because Zimmerman does not challenge the district court's conclusions on the remaining state issues, he has waived any objections to those holdings and has abandoned those issues on appeal. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).

3. *Protective Orders*

Zimmerman argues that the district court erred in granting protective orders and in denying his requests for further discovery. The district court denied Zimmerman's additional requests for discovery because "further discovery requests would be fruitless." We conclude that neither the magistrate judge nor the district judge abused his discretion in denying Zimmerman's discovery motions and granting defendants' motions for protective orders.

4. *Recusal*

Zimmerman contends that the denial of his motions to recuse the magistrate judge and the district judge was improper. His allegations are not legally sufficient to require recusal and neither the district judge nor the magistrate judge abused his discretion in denying the motions. Zimmerman argues that the magistrate judge received a financial benefit from an investment in a city-sponsored housing development without reporting it. We decline to decide this issue because it was raised for the first time on appeal. *See Brogan v. San Mateo County*, 901 F.2d 762, 765 (9th Cir. 1990).

5. *Bifurcation of Punitive Damages Claim*

Zimmerman appeals from order granting a separate trial of plaintiff's punitive damages claim and contends that separate trials are wasteful of the court's and jury's time. Our ruling on the other issues renders that contention moot.

6. *Sanctions*

In the second appeal, Zimmerman contends that the district court erred in awarding $10,006 in attorney's fees to the private defendants pursuant to 42 U.S.C. § 1988 and Federal Rule of Civil Procedure 11.

a. *Malicious Prosecution*

[5] In granting sanctions for the frivolousness of the malicious prosecution claim, the court found that there was no evidence that the private defendants controlled the decisions of the city prosecutor to initiate criminal proceedings. Contrary to the district court's statement, there was at least some evidence to support Zimmerman's claim that the private defendants "initiated" the proceedings. Zimmerman presented a transcript of a tape recorded conversation involving Zimmerman, Mr. Boyd, Elaine Dung Brown, and "police officer Tateishi" that could at least arguably support a finding that the desire of the private defendants to have the "proceedings initiated, expressed by direction, request or pressure of any kind" were the "determining factor in the official's decision to commence the prosecution." *See Restatement (Second) of Torts* § 653 cmt. g (1977); *see also Griffiths v. Cigna Corp.*, 988 F.2d 457, 463-65 (3d Cir.), *cert. denied*, 114 S. Ct. 186 (1993). Although there are no Hawaii cases applying section 653, comment g of the *Restatement*, Zimmerman had at least an arguable basis for bringing a malicious prosecution claim against the private defendants. We conclude that the district court abused its discretion in granting sanctions on this issue.

b. *Improper Motives*

[6] The district court found that many of Zimmerman's questions "could not possibly have been designed to lead to the discovery of admissible evidence" and it concluded that Zimmerman's "motives were to attack Bishop Estate for what it stands for." Zimmerman argues that it was not true that he

used the case to further his political campaign. A finding of improper purpose, however, is based on an objective standard. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990). A court should award attorney's fees to civil rights defendants only in exceptional cases. *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 202 (9th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989). This is such a case. On the basis of the district court's examples of improper questions contained in Zimmerman's interrogatories and requests for documents, we conclude that the district court did not abuse its discretion in imposing Rule 26(g) sanctions.[3]

c. *Timeliness*

Zimmerman also argues that the sanctions were untimely because they were awarded two years after the objectionable behavior. The appropriate time period for determining sanctionable misconduct must be evaluated in light of the circumstances of each case. *See In re Yagman*, 796 F.2d 1165, 1182-84 (9th Cir.), *amended on other grounds*, 803 F.2d 1085 (9th Cir. 1986). Here, the award of sanctions was made after the order granting summary judgment to the private defendants and after denial of motions for reconsideration. We conclude that the award of sanctions was timely. Zimmerman's additional argument that the motion for sanctions was improperly timed to intimidate him into submitting without an appeal is without merit.

[3]Although the district court referred to Rule 11 sanctions, we have held that Rule 11 does not govern most discovery-related sanctions. "Sanctions for discovery abuses are governed primarily by Rule 26(g) . . ., rather than Rule 11, of the Federal Rules of Civil Procedure." *In re Yagman*, 796 F.2d 1165, 1187 (9th Cir. 1986), *see also* Advisory Notes, 1983 Amendment, Fed. Rul Civ. Pro. 11 ("Although the encompassing reference to 'other papers' in . . . Rule 11 literally includes discovery papers, the certification requirement in that context is governed by . . . Rule 26(g).").

d. *Lack of Warning*

Zimmerman argues that the sanctions were applied without any warning or caution by the court that any of his claims were frivolous. He cites no authority for the proposition that the court must give him advance warnings. Assuming that Zimmerman is making a due process argument, it is without merit. Zimmerman is entitled to notice that the court is considering sanctions against him and an opportunity to be heard in opposition. *See Hudson v. Moore Business Forms, Inc.*, 898 F.2d 684, 686 (9th Cir. 1990). The private defendants moved for imposition of sanctions and Zimmerman had an opportunity to respond. The district court held a hearing on sanctions. The district court afforded Zimmerman all the process that was necessary to safeguard his rights.

e. *Amount of Sanctions*

Zimmerman contends that an award of attorney's fees of $10,006 is "high" and he claims that the court did not consider his limited resources. Although the district court should consider the plaintiff's ability to pay, *see Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 621 (9th Cir. 1987), a separate hearing on the ability to pay is not required. *Patton v. County of Kings*, 857 F.2d 1379, 1382 (9th Cir. 1988). Moreover, in *Miller*, the court said that a district court should not refuse to award attorney's fees solely on the ground of the plaintiff's financial situation. *Miller*, 827 F.2d at 621 n.5. Zimmerman appears to be arguing that the private defendants do not need the money, rather than arguing that he is unable to pay. The district court did not abuse its discretion in declining to consider expressly Zimmerman's ability to pay. We conclude, however, that the district court erred by including in the sanction award the private defendants' expenses incurred in prosecuting the Rule 11 motion. *See Lockary v. Kayfetz*, 974 F.2d 1166, 1178 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2397 (1993).

The private defendants also seek attorney's fees and costs on appeal. Although Zimmerman did not prevail on the merits, we do not find that the appeal is frivolous and we decline to award attorney's fees and costs on appeal.

Finally, we dismiss the city defendants from appeal No. 92-16408 because they never sought sanctions and Zimmerman does not raise any issues affecting them in this appeal.

In conclusion, we affirm the district court on the merits and the sanctions as to Zimmerman's improper discovery motives, but reverse the sanctions regarding the frivolousness of his malicious prosecution claim. We remand to the district court for recalculation of the sanctions award in accordance with this decision.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party shall bear their own costs.

REINHARDT, J., concurring specially in part and dissenting in part:

I.

I respectfully dissent from Part 6.b of the majority opinion, but concur in all other parts. The majority concludes that this is an "exceptional" case and that the district court properly awarded sanctions against Zimmerman. *See* Maj. Op., *supra*, at 5594-95. I disagree. In my opinion, this case is *not* so "exceptional" that it warrants the imposition of discovery sanctions against a civil rights plaintiff. Accordingly, I would reverse the district court's award as an abuse of discretion.

It is clear that Zimmerman, a perennial candidate for office and a gadfly, was a nuisance to the establishment, to Bishop Estate, and to a number of Hawaiian governmental entities.

Most communities have their Zimmermans, and few are delighted by their presence. In truth, the Zimmermans of this world are frequently obstreperous. They even get under the skin of federal judges. Still, tolerance rather than retribution should be the order of the day in our courts.

Here, the disputed sanctions were imposed after Zimmerman sued Bishop Estate under both 42 U.S.C. § 1983 and Hawaiian common law. He alleged that Bishop Estate, a powerful force in Hawaiian affairs, had caused him to be falsely arrested and maliciously prosecuted, in violation of his civil rights. Specifically, Zimmerman claimed that Bishop Estate used its immense influence to have him arrested and prosecuted by the City of Honolulu because he was a political irritant.

On April 27, 1992, the district court awarded $10,006 in attorney's fees against Zimmerman. The court found that he had used discovery for the "improper purpose" of furthering his political campaigns. It concluded that several of Zimmerman's discovery requests "*cannot conceivably be relevant* to the civil rights and tort claims alleged in Plaintiff's Complaint," but "were instead aimed at attacking Bishop Estate for what it stands for." *See* Appendix *infra* (listing the district court's examples).

II.

We have held that a court may award sanctions against a civil rights plaintiff only in "exceptional cases." *See, e.g., Mitchell v. Office of the Los Angeles County Superintendent of Schools*, 805 F.2d 844, 848 (9th Cir. 1986) (Section 1988 sanctions), *cert. denied*, 484 U.S. 858 (1987); *see also Woodrum v. Woodward County*, 866 F.2d 1121, 1127-28 (9th Cir. 1989) (Rule 11 sanctions).

In the discovery context, a case is "exceptional" — i.e., it warrants the imposition of sanctions — if the civil rights

plaintiff's requests are so irrelevant that they "*could not possibly* have been designed to lead to the discovery of admissible evidence." *See* Maj. Op., *supra*, at 5594 (quoting the district court; emphasis added).[1]

Here, Zimmerman's discovery requests were, in my view, not sanctionable. They *could* "possibly have been designed to lead to the discovery of admissible evidence." All the interrogatories specifically relied on by the district court readily qualify under this standard. Nos. 184, 186, 188, 200, and 12 all pertain directly to Bishop Estate's alleged influence over the State of Hawaii in all branches of state government or to its relations with Zimmerman. Such information is clearly relevant to Zimmerman's charge that Bishop Estate's influence led to his arrest and prosecution, or to his allegations that Bishop Estate was prejudiced against him and had a motive for causing the authorities to take action against him. The other interrogatory specifically relied on by the court is No. 148. Although not posed artfully, the question was clearly designed to elicit information to the effect that Bishop Estate (or indeed almost anyone else) could have exercised influence over the prosecutor's office.

Zimmerman's requests for documents are similarly relevant. Several of his requests (Nos. 32, 33, 57, and 58) pertain directly to Bishop Estate's alleged influence over various state entities and officials, and how that influence ultimately led to Zimmerman's arrest. The other requests expressly relied on by the district court (Nos. 30 and 31) pertain to the salaries and benefits of various defendants in this lawsuit. Because Zimmerman sought punitive damages in his complaint, he is

[1]In addition to being a civil rights plaintiff, Zimmerman is also a pro se litigant. The Supreme Court has held that pro se litigants are held to "less stringent standards" than lawyers, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), and that sanctions should "rarely be awarded" against them, *see Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (emphasis added). The standard cited by the majority is therefore consistent with the Supreme Court precedent concerning pro se litigants.

entitled not only to information about the defendants' salaries and benefits, but also to information about their assets.

The district court stated that the above discovery requests were merely "a few examples" of Zimmerman's improper questions. However, it failed to identify any of Zimmerman's other discovery requests which it believed to be improper and failed to show what, if anything, made them so. Without that information, we have no way of knowing what the court had in mind or why it imposed the sanctions on the basis of those requests. Accordingly, we must rely solely upon the discovery requests that the district court deemed significant enough to cite.[2]

In short, Zimmerman may be wholly mistaken in his charges, he may be self-deluded, he may be a wholly bothersome or even nutty pro se litigant. But, whatever he is, his interrogatories and requests for documents are hardly so irrelevant to the causes of action he alleged that they "*could not possibly* have been designed to lead to the discovery of admissible evidence."

III.

In sum, I believe that this case is not so "exceptional" as to warrant the awarding of discovery sanctions against Zimmerman. Accordingly, I would reverse the district court's award. I respectfully dissent.

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[2]Although the exact significance of the "Save Sandy Beach Coalition" deposition questions is unclear, they play a relatively minor part in the sanctions drama. Under the district court's test, sanctions could be imposed only if *all* of Zimmerman's requests were irrelevant. In any event, because the district court also failed to explain why the deposition questions were irrelevant, we need not defer to its findings on that point.

APPENDIX

Interrogatories:

148. Admit that the Prosecutor's Office is highly politicized and staffed with incompetent prosecutors.

184. Admit that the vast financial resources of the Bishop Estate enable it to exercise enormous influence over judicial, political, economic and social events in the State of Hawaii.

186. Admit that the Bishop Estate is prejudiced against Plaintiff because he Chooses [sic] to run in the State's elections against its preferred candidates.

188. Admit that the Bishop Estate is prejudiced against Plaintiff because Plaintiff thiks [sic] that the Bishop Estate's tax status as a charitable trust is a sham and should be canceled.

200. Admit that the interlock between the Hawaii State Supreme Court and the Bishop Estate has produced conflicts of interest in lawsuits that have been pending from time-to-time before the Hawaii State Supreme Court.

12. Plaintiff requests each and every record which reflects the tax status of Bishop Estate and each of its subsidiaries.

Requests for Production of Documents:

30. Plaintiff requests a job description, date of employment, list of qualifications and annual renumeration including bonuses, expense accounts, and benefits for the positions of Bishop Estate Trustee, Bishop Estate caretaker, Bishop Estate land manager, Corporate Counsel for the City and County of Honolulu ....

31. Plaintiff seeks a schedule of the salaries paid to trustees of the Bishop Estate from 1984 to 1990.

32. Plaintiff seeks a schedule of the amounts of money paid over to the Kamehameha Schools and other charities by the Bishop Estate for the period from 1984 to 1990.

33. Plaintiff seeks a schedule of all of the beneficiaries of the Bishop Estate and a schedule of the monies paid to them for the period from 1984-1990.

57. Plaintiff seeks from Bishop Estate all documents pertaining to relationships with, or participation with or joint ventures with the Office of Hawaiian Affairs or the various state, city and federal agencies involved in the governance, administration, oversight and implementation of the Hawaiian Homesteads Act and any related legislation.

58. Plaintiff seeks from Bishop Estate the names of all sitting, retired and deceased members of the judiciary that have had any relationship with or to the Bishop Estate, including business dealings, legal, consultive, debtor, or any other such relationship.

Deposition Questions:

Are you now associated with the Save Sandy Beach coalition? ... Have you ever been associated with the Save Sandy Beach coalition?

Do you know of anyone who works for Bishop Estate who's associated with the Save Sandy Beach Coalition?

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